Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1244

HENRY J. WADDELL, *Petitioner*,

v.

PEPSI COLA COMPANY, *Respondent*.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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PETITIONER REFUTES RESPONDENTS MEMORANDUM

The defendant's settlement statement (appendix 1a) adopted in the court's pre-trial order, (appendix 2a), admits an undisputed fact that plaintiff lost the tip of his finger as a result of the collision between plaintiff's and defendant's vehicles. Plaintiff relies upon this admission of the causation as to the loss of his finger as being undisputed; the issue was negligence or contributory negligence on the part of the plaintiff and his assumption of risk as to his injury and this issue was decided by a jury.

After the jury returned its verdict for the plaintiff, the defendant was denied his JNOV and new trial motion by order of the trial judge (appendix 3a) from which defendant filed his untimely appeal (appendix 4a). No judgment was entered on the jury verdict, however the Defendant-Appellant-Respondent represented to the appellate court that a judgment had in fact, been entered on the jury verdict in his designation of record (appendix 5a). When it was ascertained that there had in fact, been no judgment entered for plaintiff on the jury verdict, the case was placed on the ready for Trial Calendar and a trial date of October 4, 1976, was set with notices being sent (appendix 2a). By his silence and inaction it appeared that counsel for Pepsi had no objection to the second trial, for which he did not appear or explain why; however, petitioner did have to respond (appendix 6a).

This court is presented with an appellate court decision (Respondents 1a) that reverses a judgment that did not exist in the trial court and when on page 2 of its opinion.

> "There are several differences in the testimony of the drivers of the car [Appellee] and truck [employee of Appellate] as to precisely what occurred at this point."

The fact that there are, as admitted by the Court, "several differences in the testimony" of the parties below places the matter squarely in the hands of the jury; and that being the case, the jury considered these differences, weighed the evidence, and made its findings of fact.[1]

---

[1] D.C. Code, Section 17-305(a) provides:

[continued]

However, we have an appellant who represents to the tribunal the correctness of the record by his designation of record wherein he states a judgment has been entered, when in fact, none has and who notes his untimely appeal from an unappealable order which results in the trial judge reversing himself because of a decision based upon a procedure which *this* court has repudiated. It is agreed that the issuance of the order directing a verdict for Pepsi was a nullity because the decision of the D.C. Court of Appeals was a nullity. The appellate court did not have jurisdiction on this case because appellants appeal was untimely, improper, and invalid and no judgment or final order had been entered by the trial court.

---

[1] (continued)

> "In considering an order of judgment of a lower court *** brought before it for review, the District of Columbia Court of Appeals shall review the record on appeal. When the issues of fact were tried by jury, the court shall review the case only as to matters of law.***"

CONCLUSION

Justice and the balancing of the interests require that this court issue a writ of certiorari to the District of Columbia Court of Appeals and Order that judgment be entered for plaintiff on the jury verdict of April 11, 1972.

Respectfully submitted,

WILLIAM A. BURLESON
1000 Pennsylvania Ave., S.E.
Washington, D.C. 20003
Attorney for Petitioner

Of Counsel:

Charles B. Hodson
114 Bullard Building
Chapel Hill, North Carolina

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FORM [illegible]

SETTLEMENT STATEMENT

HENRY J. WADDELL
Plaintiff

Address

VS.

PEPSI COLA COMPANY
Defendant

Address

Calendar No. 8504-j - November 5, 1971
Judge Sorrell - 9:15 a.m.
Room 315, A Building

C.A. NO. 22207-70

SETTLEMENT STATEMENT OF DEFENDANT

(1) Brief Statement of the Nature of the Controversy.

On April 30, 1969, vehicle of defendant was making delivery at 7th and H Streets, N.E. Because of solid parking at curb, defendant's vehicle double parked just west of the west crosswalk of 7th Street. Plaintiff's vehicle proceeded out on 7th and made right turn into H and in process of so doing struck vehicle of defendant. While defendant's vehicle moved forward to separate vehicle after impact, plaintiff attempted to get out of his car through right passenger door and opened door in path of defendant's vehicle causing collision and loss of tip of plaintiff's finger.

(2) Concise Statement of Plaintiff's Claims:

(3) Concise Statement of Defendant's Defenses:

Defendant denies negligence and avers sole or contributory negligence of the plaintiff in opening door into path of moving traffic, failing to keep proper look-out for his own safety and exiting from car without caution. Defendant further avers plaintiff assumed the risk of injury.

(4) Concise Statement of Any Other Claims (cross-claims, counterclaims, or Third-Party claims and Respective Defenses Thereto:

(5(a) For Claimants: Itemization of special, general, residual or permanent damages or other relief sought.

(b) For Defendants: Itemization of matters in mitigation of damages or in opposition to relief sought.

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(c) What is the maximum offer or minimum demand now acceptable to your client?

As this is not a case of liability, defendant is not willing to make any offer.

Respectfully Submitted,

GALIHER, CLARKE, MARTELL & DONNELLY

AUSTIN F. CANFIELD, JR.

Address of Signer

1215 - 19th Street, N.W.
Washington, D.C. 20036
337-8330

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid this 3rd day of November, 1971, to William A. Burleson, Esquire, Attorney for Plaintiff, 1000 Pennsylvania Avenue, S.E., Washington, D.C. 20003.

AUSTIN F. CANFIELD, JR.
Attorney for Defendant

11th Cert. 8.

8504-J

22207-'70

District of Columbia Court of General Sessions

CIVIL ACTION NO._____

HENRY J. WADDELL

VERSUS

PEPSI COLA COMPANY

DATE	COURT CLERK'S MEMORANDUM	JUDGE
	Ready for Trial Calender	
3-1970		
3 1971	To be reset for settlement conference	Judge Malloy
5,71	Pretrial- Adopt statements as pretrial order, Trial date 1/20/72.	
13 1972	Ds Request for Cont'd is Granted Cont'd from Jan 20,72 to Apr. 10,72 Order signed here in	
10,1972	JURY EMPANELED AND SWORN, JURY RESPITED UNTIL APRIL 11, 1972 AT 9:30 AM. (WS)	Judge Ketcham
11,72	TRIAL RESUMED, AT CONCLUSION OF TRIAL, JURY RETURNS VERDICT FOR THE PLAINTIFF, IN THE AMOUNT OF $12,500.00 Actual. (WS)	Judge Ketcham
12,72	GISELE WHYTE OFFICIAL COURT REPORTER, MOTION FOR JUDGMENT N.O.V. - MOTION TAKEN UNDER ADVISEMENT. (WS)	Judge Ketcham
24,72	Motion for NOV/NEWTRIAL DENIED. Order Attached. to	Judge Ketcham
e 19,72	Notice of appeal Filed	
G 7 1972	Appeal Completed. Attorney Notified. pnh	
-6-73	Opinion & Certified Copy of Judgment from D.C. Court of Appeals filed. (WS)	

BEST COPY AVAILABLE

0 1976	Ready for Trial Calendar	
5 1976	~~Trial Date Set For~~ 10/4/76 Notice Sent.	

SUPERIOR COURT
CIVIL ASSIGNMENT OFFICE
440 G STREET, N.W. RM. 514
WASHINGTON, D.C. 20001

William A. Burleson Esq.
Attorney at Law
1000 Penn Ave. S.E.

WASHINGTON, D.C.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Calendar No. 5277-1 Civil No. 22207-70

HADDELL vs. PEPSI COLA CO.
Plaintiff *Defendant*

The above-captioned civil action has been set on the JURY Calendar for 10-4-76 at 9:30 A. M.

Should this trial date conflict with a previously set trial or appellate argument, you must appear before the Civil Calendar Control Judge within ten days of mailing of this notice to arrange for a different trial date to which other counsel consent. The failure of counsel to make such appearance is a representation to the Court that no conflict exists and renders the above date a firm trial date.

JOSEPH WEST
Assignment Commissioner

REPORT TO ASSIGNMENT OFFICE

M207—74

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

HENRY J. WADDELL,	:	
vs.	:	**CIVIL ACTION**
	:	**No. 22207-70**
PEPSI COLA COMPANY	:	

ORDER

Upon consideration of Defendant's Motion for Judgment N.O.V. or in the alternative, for New Trial, and the Plaintiff's Points and Authorities in Opposition, and the arguments of both counsel in open court at a hearing on the motion, the Court is of the opinion that Defendant's motion should be denied.

The Defendant alleges in its motion that the jury verdict was against the weight of the evidence in that the Plaintiff was unable to explain fully how he lost his finger in this accident. The Court, however, is of the opinion that there were sufficient facts established to enable the jury to make logical inferences and thereby reach a responsible decision as to the proximate cause of the injury without speculation.

There were several conflicting versions of how this accident happened. The Court acknowleges that, if the jury adopted the factual version upon which the Defendant relies, the accident was the result of the negligence of Plaintiff himself, and the Defendant could not be liable. However, the jury could and apparently did find other facts which established the negligence of Defendant's truck

driver so as to hold Defendant liable for Plaintiff's injury. It is also clear that Plaintiff acted unwisely in the circumstances. But whether his stopping his automobile in the center lane and getting out of the right side of the car to inspect the damage constituted contributory negligence and a proximate cause of the injury he sustained is open to question. Therefore, it was properly an issue to be decided by the jury. In the circumstances the Court does not believe that it should have taken the issue from the jury and directed a verdict.

The Defendant also alleges that the jury was distracted during the judge's charges to the jury because two U.S. Deputy Marshals entered the Courtroom. The Court noticed only a momentary shifting of some jurors' eyes because of their entry. If this minor interruption temporarily distracted the jury, the Court believes that it does not warrant a new trial.

The Defendant further argues that the Court erred in admitting into evidence the spontaneous utterance of the Defendant's driver to the Plaintiff made at the time of the accident to the effect that he "thought he could make it." The *res gestae* exception to the hearsay rule properly applies to such a statement and permits it to be admitted into evidence. Beyond this, of course, the Defendant's driver himself later took the stand to testify as to the entire context in which the alleged statement was made.

The Defendant also complains that the Court erred in admitting the entire deposition of the Plaintiff into evidence. The Court, however, is of the opinion that once the Defendant introduced part of the Plaintiff's deposition into evidence, Rule 32, subsection (a)(4) permitted the Plaintiff, as an adverse party, to require the introduction

of "any other part which ought in fairness to be considered with the part introduced . . .". Under the circumstances of this case, and with particular regard to the nervousness of the Plaintiff in his sincere efforts to recount the events of the accident in which he lost his right index finger, the Court is of the opinion that "fairness" required the admission of the entire deposition so as to give the jury the benefit of the Plaintiff's testimony taken under oath and subject to cross-examination, but taken under far less traumatic conditions.

WHEREFORE, it is the 23rd day of May, 1972, ORDERED, ADJUDGED and DECREED that Defendant's Motion for Judgment N.O.V. or, in the alternative for New Trial, be and hereby is DENIED.

/s/ ORMAN W. KETCHAM
Orman W. Ketcham
Associate Judge

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

HENRY J. WADDELL, *Plaintiff.*	:	
vs.	:	**No. 22207-70**
PEPSI COLA COMPANY, *Defendant.*	:	

[Filed June 19, 1972]

NOTICE OF APPEAL

Notice is hereby given that Pepsi Cola Company appeals to the District of Columbia Court of Appeals from the (order) of this court entered on the 23rd day of May, 1972.

Names and address of parties
or attorneys to be served:

William A. Burleson, Esquire
1000 Pennsylvania Ave., S.E.
Washington, D.C. 20003
Attorney for Waddell

/s/ AUSTIN F. CANFIELD
Austin F. Canfield, Jr.
Attorney for Pepsi Cola
1215 19th Street, N.W.
Washington, D.C. 20036
202–337-8330

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

HENRY J. WADDELL, *Plaintiff.*	:	
vs.	:	**Civil Action**
	:	**No. 22207-70**
PEPSI COLA COMPANY, *Defendant.*	:	

DESIGNATION OF RECORD

1. Complaint.
2. Answer
3. Deposition of Plaintiff
4. Jury Verdict and Judgment entered thereon
5. Motion of Defendant for Judgment N.O.V. or in the Alternative for New Trial
6. Order of Judge Ketchum dated May 23, 1972
7. Transcript of Proceedings

GALIHER, CLARKE, MARTELL & DONNELLY

AUSTIN F. CANFIELD, JR.
1215 19th Street, N.W.
Washington, D.C. 20036
202–337-8330
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this 20th day of June, 1972, to William A. Burleson, Esquire, Attorney for Plaintiff, 1000 Pennsylvania Avenue, S.E., Washington, D.C.

AUSTIN F. CANFIELD, JR.

[Letter dated January 25, 1977]

WILLIAM A. BURLESON
Attorney at Law
1000 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202)544-4111, 544-4115

Charles B. Hodson

Chapel Hill, N.C.
(919)942-5057

January 25, 1977

Cable:
Wilburl

Austin F. Canfield, Jr., Esquire
4400 Jenifer Street, N.W.
Washington, D.C. 20015

Re: Waddell v. Pepsi Cola Company
Civil Action No. 22207-70

Dear Mr. Canfield:

You leave me no alternative but to respond to your letters of October 13, and December 9, 1976. The circulation of your letters among court personnel has caused considerable confusion and embarrassment. As past President of the Bar Association your name and words carry a lot of weight with these court personnel. Frankly, you are the only lawyer I know of who can take a trial off the daily calendar; as you did this one. It bothers me when you threaten sanctions, particularly, when Mr. Waddell and his witnesses had to wait all day in court for his trial that was cancelled.

You know that judgment for the plaintiff was never entered in the above case, even though the jury awarded him $12,500.00. You stated to the Clerk of the Court that judgment had been entered for the plaintiff and you designated to the D.C. Court of Appeals, that a judgment had been entered for the plaintiff on the jury verdict. Neither is correct. You appealed from the denial of your motion for a Judgment N.O.V. and/or new trial. You and I both know that the most you ever contemplated was a re-trial of this case before a different trial judge, and that is what you indicated on June 19, 1972 when you offered Mr. Waddell $4.500.00 to keep you from filing your Notice of Appeal.

I am sure that you know that an appeal taken from a jury's verdict or decision of the court before judgment has been entered would be premature and would be dismissed. A mere notation of a jury verdict is not entry of judgment, it is not possible in any case for an opinion to have the effect of a judgment, and the denial of a motion for Judgment N.O.V. and/or a new trial is not appealable.

Some courts have disregarded the clear provision of rule 79(A) that "every judgment must be set forth on a separate document and must be entered on a docket", and have accepted appeals, but a unanimous Supreme Court repudiated these few aberrant decisions and has held it a requirement that the judgment be set forth in a separate document and must be mechanically applied in all cases. See *U.S. v. Indrelunas*, 411 U.S. 216, 93 *Supreme Court Reporter* 1562; also *Wright and Miller, Federal Practice and Procedure*, Sec. 2781-2800.

It would appear therefore that the Appellate Court in this case never had jurisdiction. Your appeal from the decision denying you Judgment N.O.V. and/or new trial motion was premature, no judgment has ever been entered for the plaintiff, and a court cannot reverse a judgment that never existed.

You are also aware that when this case was returned to Judge Ketcham he had it placed on the ready calendar and a new trial was set for October 4, 1976. At a pre-trial on another case, Judge Ketcham informed me that you had in fact discussed this matter of the Waddell re-trial with him. If anyone had been done an injustice it is Mr. Waddell. He is entitled to judgment on the jury verdict, including interest and costs. However, it appears that the trial court considered circumstances which it thought compelled it to grant a new trial. So, Mr. Waddell began preparation for the second trial scheduled for October 4, 1976. A further investigation was made, additional witnesses were discovered, and efforts were made to have the accident, injury, and scene simulated by experts. We appeared in the assignment office on October 4, 1976 ready to go out for trial, but in the afternoon were informed that you were not showing up and the case was being taken off that day's trial calendar. Naturally, I made application for default.

I am therefore asking that the Clerk enter Judgment including costs and interests for the Plaintiff on the jury verdict and let this case proceed to garnishment or appeal; or return this case to the trial calendar on which it was originally placed, or enter a default.

Sincerely,

/s/ WILLIAM A. BURLESON
William A. Burleson

cc: Clerk of the Civil Court

WAB/pms